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Attorneys for Defendant
TRAVIS MOCK

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

SA

UNITED STATES OF AMERICA, Plaintiff, v. TRAVIS MOCK, Defendant.	CASE NO. CR 06-123-RGK DEFENDANT'S POSITION RE: SENTENCING FACTORS; EXHIBITS Date: January 8, 2007 Time: 1:30 P.M. Place: Courtroom 850 -- Roybal

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I.

PRELIMINARY STATEMENT

On October 5, 2006, defendant Travis Mock pleaded guilty, pursuant to a plea agreement, to a single-count indictment charging him with possessing fifteen or more unauthorized access devices, in violation of 18 U.S.C. § 1029(a)(3). More specifically, Mr. Mock admitted that he obtained -- *but never used* -- 66 credit card numbers from Marriott Hotel time-share forms. The parties agreed that, under the

applicable sentencing guidelines, the loss, which is based entirely upon the $500 per access device presumptive loss established by the sentencing guidelines, was between $30,000 and $70,000. U.S.S.G. § 2B1.1, comment., n. 3(F)(I). However, since Mr. Mock did not actually use any of the credit card account numbers, he did not cause any *actual* loss. (PSR ¶ 14.)

This Court referred the matter to the probation office for preparation of a presentence report, and that report, excluding the confidential recommendation, was timely disclosed to the parties. In its report, the probation office recommends that this Court find (1) that the total offense level is **10**, (2) that Mr. Mock has **11** criminal history points and thus falls within a criminal history category **V**, and (3) that the sentencing range is **21-27** months. Pursuant to the plea agreement, the government recommends that Mr. Mock be sentenced at the low end of the guideline range, which is **21** months. Mr. Mock does not have any objections to the presentence report's sentencing guidelines calculations.

Mr. Mock submits this Position Re: Presentence Report to assist this Court in imposing a sentence that is "sufficient but not greater than necessary" to achieve the statutory purposes of punishment, as required by 18 U.S.C. § 3553(a) in light of *United States v. Booker*, 543 U.S. 220 (2005). *Booker* restored sentencing courts' ability to fashion a sentence tailored to the individual circumstances of the case and defendant by requiring courts to consider factors other than the sentencing range prescribed by the Sentencing Guidelines. Under Section 3553(a), courts are actually *required* to sentence below the range if such a sentence would be sufficient to achieve the purposes of punishment.

Here, pursuant to 18 U.S.C. § 3553, the Court should impose a sentence below the guideline range. Mr. Mock respectfully requests that this Court consider several

important circumstances of this offense and of his life (§ 3553(a)(1)), his genuine need for treatment for his recurring drug addiction (§ 3553(a)(2)(D)), and the kinds of sentences available (§ 3553(a)(3)), and in doing so submits that this Court should conclude that a split sentence of nine months in custody and six months in an approved residential drug treatment facility is an appropriate, but not greater than necessary, punishment.

Mr. Mock is only 22 years old. His conduct was unsophisticated and sophomoric. In fact, his background and the circumstances of this offense indicate that he is not a hardened criminal, but rather that he is a drug addict. Sadly, despite the numerous opportunities to diagnose and treat his addiction, prior to being arrested for the instant offense, he has never received any drug treatment or education. But Mr. Mock has shown the potential to turn himself around: he has managed to stay clean for long periods of time as evidenced by the fact that he discharged his state parole after 13 months (which included consistent drug testing). And that track record indicates that, with intensive residential treatment and the benefits of federal supervision, Mr. Mock can beat his addiction and set himself on the proper path.

II.

OBJECTIONS TO THE PRESENTENCE REPORT

1. Paragraphs 7(c) and 66: Mr. Mock objects to the inclusion in the presentence report of characterization that he is a member of the "Insane White Boys (IWB) gang." There is no reliable evidence that Mr. Mock is a gang member. The source of that information is the confidential informant (CI). However, the CI's information is demonstrably unreliable. Not only did the CI provide that information after being arrested for his own drug use and passing of counterfeit currency, but also the CI proved himself to possess more inaccurate information (*i.e.*, Mr. Mock

possessed thousands of profiles, sophisticated computer equipment, and sold drugs from his apartment) than accurate information. Therefore, his uncorroborated accusation should be ordered stricken from the report. It is particularly important that this allegation be stricken because a presentence report follows a defendant around for all subsequent federal law enforcement contacts and could put his safety and security in jeopardy in federal custody.

2. Paragraphs 36-38: It does not appear that Mr. Mock was represented by counsel in the court proceedings that led to the juvenile conviction described in these paragraphs. Waivers in quick California court proceedings – such as the proceeding in this case appears to have been – frequently fall short of the constitutional standards for a valid waiver of the right to counsel, so this conviction may be subject to attack. *See Custis v. United States*, 511 U.S. 485, 496 (1994) (recognizing right to collaterally attack conviction used to enhance sentence based on denial of right to counsel but declining to extend to other constitutional challenges). Defense counsel has reviewed the pertinent records retrieved by the United States Probation Office and they do not establish that Mr. Mock was represented by counsel.

III.

APPROPRIATE SENTENCE UNDER 18 U.S.C. § 3553(a)

A. THE LIMITED WEIGHT TO BE GIVEN THE SENTENCING GUIDELINES AFTER *BOOKER*

No court now needs to be reminded that *United States v. Booker*, 543 U.S. 220 (2005) made the sentencing guidelines advisory rather than mandatory. The effect of these holdings on sentencing was explained by Justice Breyer in his opinion for the Supreme Court on this issue:

> Without the "mandatory" provision, the [Sentencing Reform] Act nonetheless requires judges to take account of the Guidelines together with other sentencing goals. *See* 18 U.S.C.A. § 3553(a) (Supp. 2004). The Act nonetheless requires judges to consider the Guidelines "sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant," § 3553(a)(4), the pertinent Sentencing Commission policy statements, the need to avoid unwarranted sentencing disparities, and the need to provide restitution to victims, §§ 3553(a)(1), (3), (5)-(7) (main ed. and Supp. 2004). And the Act nonetheless requires judges to impose sentences that reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and effectively provide the defendant with needed educational or vocational training and medical care. § 3553(a)(2) (main ed. and Supp. 2004).

Booker, 543 U.S. at 259-60. As Judge Wardlaw noted in her opinion in *United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005) (en banc): "*Booker*'s profound impact on federal sentencing" is that it "restor[es] the discretion to the sentencing court that the mandatory guidelines had stripped away." *Ameline*, 409 F.3d at 1099 (Wardlaw, J., concurring in part and dissenting in part). And "[t]here is no presumption that [the advisory guideline range] has taken into account all of the relevant circumstances that the statute states that the court 'shall consider.'" *United States v. Diaz-Argueta*, 447 F.3d 1167, 1171 (9th Cir. 2006). "Indeed, district courts may even consider factors that were precluded from consideration altogether prior to *Booker*," and "have the discretion to weigh a multitude of mitigating and aggravating factors that existed at the time of mandatory Guidelines sentencing, but were deemed 'not ordinarily relevant.'" *Ameline*, 409 F.3d at 1093 (Wardlaw, J., concurring in part and dissenting

in part).

B. THE NATURE AND CIRCUMSTANCES OF THE OFFENSE

Mr. Mock has accepted responsibility for possessing, without authorization and with the intent to defraud, more than 15 access devices. Specifically, Mr. Mock admitted -- both in a statement to law enforcement prior to his arrest and in the resulting plea agreement -- that he obtained 66 separate documents related to a Marriott Hotel time-share promotion. Each such document contained a credit card number. The parties stipulated that, for the purposes of the sentencing guidelines, the loss was between $30,000 and $70,000 (66 x $500 = $33,000). That stipulated loss amount was based on United States Sentencing Guideline 2B1.1, Application Note 3(F)(i), which provides that loss includes any unauthorized charges "and shall not be less than $500 per access device." The defense agrees that, under the guidelines, the stipulated loss range is correct when applied to these facts.

But after *Booker*, a sentencing court must of course do more than merely consider the sentencing guidelines: it must also consider the (1) nature and circumstances of the offense and (2) the need for the punishment to reflect the seriousness of the offense. 18 U.S.C. § 3553(a)(1), (a)(2)(A). Therefore, like the rest of the sentencing guidelines the imposition of the $500 per account number minimum is only advisory.

Upon consideration of the lack of sophistication involved in this offense and the underlying rationale for the $500 per account number presumptive loss this Court should use its discretion under *Booker* to impose a sentence below the guideline range. First, Mr. Mock did not use any of those credit card numbers and the government agreed that there is *no actual loss* attributable to Mr. Mock's possession

of those account numbers. In fact, Mr. Mock did not use those account numbers because, as he told the arresting agents, he did not believe that he could. In other words, he did not know how to use the account numbers. More specifically, although Mr. Mock had the account numbers and expiration dates, he did not have the additional security numbers that are required in many (if not most) transactions these days. It is unlikely that he actually needed those additional security numbers. But because he thought he did, he never used the account numbers.

Moreover, Mr. Mock was in possession of the numbers for (at least) several weeks. Yet, he did not use any of them. While it is sometimes the case that a defendant does not cause harm because of good police work, that does not appear to have been the case here. Mr. Mock had the account numbers in his possession for several weeks. He could have easily tried to use one right away.[1] The fact that he did not only buttresses Mr. Mock statement that he did not know how to use the numbers. This was utterly an unsophisticated defendant. And for that reason, the applicable guideline range overstates the seriousness of the offense.

The rationale underlying the imposition of the $500 per account number minimum, however, appears to be focused primarily on *sophisticated* identity theft and credit card schemes. Amendment 596 to the Sentencing Guidelines, which added the $500 minimum to the sentencing guidelines in November 2000, specifically notes that identity theft crimes occur "along a continuum of offense conduct. The most basic type of identity theft occurs when a thief steals a wallet and uses a stolen credit card to make a purchase or forges a signature to cash a stolen check." U.S.S.G., App. C, Amend. 596. Here, Mr. Mock's conduct is even less sophisticated than the "most basic type[s]" discussed above. Mr. Mock was not able to use any of the account

[1] It is often the case that a defendant who acquires a credit card account number of another will quickly make a small charge on the account to ensure that the number is valid and operable without raising suspicion.

numbers.

Amendment 596 goes on to state that, in the Sentencing Commission's view, Congress was more concerned about "more aggravated and sophisticated forms of identity theft" than those described above. Therefore, the Sentencing Commission amended the guideline to include the $500 minimum, among other amendments and enhancements, to enhance the punishments of individuals who engage in "financial and credit account take-overs," where the defendant engages in "affirmative activity to generate or 'breed' another level of identification . . . ." *Id.* The Sentencing Commission noted that the credit take-over is more sophisticated because of the "additional steps" that further "conceal and continue the fraudulent conduct." *Id.* According to the Sentencing Commission, the result to the victims are increased monetary and non-monetary harm. Accordingly, the Sentencing Commission determined that "this aggravated offense conduct, in contrast to the most basic forms of identity theft, merits enhanced punishment." *Id.*

Here, a sentence within the guideline range, and thus a sentence based on the $500 minimum, would overstate the seriousness of the offense. Mr. Mock, who caused *no actual loss*, would end up being punished like an individual who actually caused a loss of up to $70,000. That would overstate the seriousness of Mr. Mock's conduct.

Using the discretion restored to this Court by *Booker* to impose a sentence below the guideline range based on the $500 minimum is not unprecedented. Although there is a dearth of reported cases addressing this issue, the defense is aware of at least one recent case in which a district court decided to sentence based on the actual loss rather than on the $500 per account number minimum. In *United States v. Mantizian*, CR 06-66-SJO, the Court sentenced the defendant based on the

actual loss of $130,215.15 rather than on the presumptive loss of $1,017,500.00, which was derived from the $500 per account number minimum for each of the 2,035 account numbers. To properly reflect the seriousness of the offense, it would be appropriate to do the same in this case.

C. MR. MOCK'S HISTORY AND CIRCUMSTANCES

Travis Mock was born on February 3, 1984. He is 22 years old. Despite that, he has already had several run-ins with the law. A review of his background provides several clues as to how he has found himself in trouble at such a young age. More importantly, however, his background also provides a solid basis to believe that Mr. Mock can turn his life around.

During his childhood, Mr. Mock's immediate family consisted of his mother and four brothers. The presentence report notes that Mr. Mock's father was "not in the picture." In fact, Mr. Mock's father did not play a positive role in Mr. Mock's upbringing. His father spent virtually all of Mr. Mock's childhood addicted to drugs (methamphetamine) and in-and-out of jail.

As a relatively young man, it is difficult for Mr. Mock to appreciate how this has impacted him. But it is nonetheless clear that it has. Mr. Mock began to find himself in trouble soon after his father re-entered his life. By age 16 or 17, Mr. Mock had dropped out of high school, begun experimenting with drugs, and working with his father. Although Mr. Mock sees his mother as a positive, stabilizing force in his life, she had already moved out of state when she remarried. Accordingly, Mr. Mock's primary role-model and provider of emotional support became his father. It is obvious, based not only on Mr. Mock's own criminal history, but also on the legal troubles of his two older brothers, that Mr. Mock's father failed to teach his children

to learn from his mistakes. This is especially true with respect to use of methamphetamine.

Although Mr. Mock has made bad decisions -- virtually all of which involve his use of methamphetamine -- he has also shown the potential to live a positive and productive life. As his mother pointed out, Mr. Mock has never had anything given to him. Rather, the little that he has (*i.e.*, his own apartment and automobile) he has had to earn. But maybe the most important thing he has earned is his experience and knowledge as a glazier. Those skills will almost certainly provide Mr. Mock with some financial security in the future.

Mr. Mock has also shown the potential to beat his drug addiction. Although he has never received drug abuse treatment or education (until being arrested in this case), Mr. Mock was able to discharge his state probation in 13 months without failing any drug tests or picking up any new criminal conduct. And since being arrested in this case, Mr. Mock has demonstrated his determination to beat his addiction.[2] He is taking a course entitled "Positive Life Attitudes," which is a substance abuse prevention course. His professor indicates that

> Mr. Mock is a good student, participates extremely well in class and displays a positive attitude. He appears motivated to learn and has been provided with valuable information, including coping skills that will benefit him in the future.

(*See* Exhibit A.) Another professor of his, for a class entitled "Positive Life Attitudes/Breaking Barriers" stated that

[2] When Mr. Mock made his initial appearance, the government agreed to a pre-trial release to allow Mr. Mock to immediately commence drug abuse treatment. However, because of a dearth of other bail resources, Mr. Mock was not granted a pre-trial release.

> Mr. Mock has a positive attitude in class, and his attendance record has been excellent. It is hoped the court will give serious consideration to Mr. Mock's positive efforts when making its decision regarding the disposition of his case.

(*See* Exhibit B.)

This makes Mr. Mock's case not one of hopelessness, but more a case of whether the glass is half empty or half full, or a case of two steps forward, one step back. On the one hand, he has previously reverted to drug use and criminal activity. But on the other hand, he successfully discharged from parole after 13 months of drug testing and stayed clean that entire time. Moreover, since going into custody in this case, he has taken great interest in his drug abuse courses. Considering the fact that he has never before had the opportunity to receive meaningful drug treatment, Mr. Mock appears ready to overcome his addiction.

D. THE NEED FOR TREATMENT

In his presentence interview, Mr. Mock candidly told the United States Probation Officer that he "believes that his methamphetamine use has become a problem and has negatively affected his life." (PSR ¶ 75.) It obviously has. He has tried to break his dependence on methamphetamine, but has always resumed his drug use. (*Id.* at ¶ 72.) Despite that and despite his prior convictions for methamphetamine-related offenses, Mr. Mock has never been offered any formal drug abuse treatment.[3]

[3] While Mr. Mock was in state custody he participated in a Narcotics Anonymous program. However, the program was not helpful as the other participants did not take it seriously and Mr. Mock did not have a sponsor.

Both the sentencing guidelines and § 3553(a) permit this Court to substitute time in a drug treatment facility for time in custody. Application Note 6 to Sentencing Guideline § 5C1.1 provides that a substitution of a period in an approved residential drug treatment program for an equal term of imprisonment can be considered in cases in which "the defendant's criminality is related to the treatment problem to be addressed and there is a reasonable likelihood that successful completion of the treatment program will eliminate the problem." Similarly, under § 3553(a) this Court is required to consider both the "kinds of sentences available" as well as the need for the sentence to provide the defendant with "medical care or other correctional treatment in the most effective manner." 18 U.S.C. § 3553(a).

Substituting treatment for a period of incarceration is appropriate here. Mr. Mock is only 22 years old. It is not too late for him. However, it is becoming clear that he cannot beat his addiction on his own. He has already had various contacts with the state criminal justice system and yet has not received any necessary treatment. Moreover, the enthusiasm with which Mr. Mock has approached the treatment options currently available to him suggests that his truly desires to receive drug abuse treatment.

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IV.

OBJECTION TO IMPOSITION OF ANY SPECIAL CONDITIONS OF SUPERVISED RELEASE WITHOUT PRIOR NOTICE

Because the presentence report's recommended sentence is confidential, and because the recommendation of any special conditions of supervised release is contained within the probation officer's letter to the Court, Mr. Mock has not had an opportunity to read or respond to the probation officer's discussion of any special conditions of supervised release proposed to the Court in fashioning an appropriate sentence in this case. Therefore, the defense objects to the imposition of any special conditions of supervised release of which the defense has not been given notice. *See United States v. Wise*, 391 F.3d 1027 (9th Cir. 2004) (holding district court erred in imposing special condition of supervised release with no prior notice).

V.

CONCLUSION

Based on the foregoing, Travis Mock respectfully requests that this Court impose a split sentence of nine months in custody and six months in an approved residential drug abuse treatment program. That is long enough to punish Mr. Mock and provide a serious consequence for his offense, but will give him the treatment he needs to avoid repeating his mistakes.

Respectfully submitted,

SEAN K. KENNEDY
Acting Federal Public Defender

DATED: December 28, 2006

By _____
MICHAEL V SCHAFLER
Deputy Federal Public Defender

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A History of Success,
A Future of Promise

Erlinda Martinez, Ed.D.
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(714) 628-5980

November, 2006

Subject: Mock, Travis
DOB: February 3, 1984

To whom this may concern,
On behalf of Mr. Travis Mock, it's my pleasure to write this letter which confirms that he is presently enrolled in the Positive Life Attitudes, Substance Abuse course. The three hour class meets every Friday afternoon at the Santa Ana Jail facility. He began attending classes on September 8, 2006 and has attended a total of eight classes.

Mr. Mock is a good student, participates extremely well in class and displays a positive attitude. He appears motivated to learn and has been provided with valuable information, including coping skills that will benefit him in his future.

Respectfully,

Luis Martinez
Instructor

EXHIBIT B

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November 1, 2006

From: Patricia Coyle
Santa Ana College
School of Continuing Education
Santa Ana, CA 92660

Subject: Letter of recommendation

To Whom It May Concern,

I am pleased to write a letter of recommendation for Mr. Travis Mock. Mr. Mock is enrolled in the inmate education program at the Santa Ana City Jail, which is presented through the Santa Ana Community College School of Continuing Education. Specifically, Mr. Mock has been attending the *Positive Life Attitude/BREAKING BARRIERS* classes. To date he has completed 15 hours, and he is working toward a *CERTIFICATE OF PARTICIPATION* award from the program.

Mr. Mock has a positive attitude in class, and his attendance record has been excellent. It is hoped the court will give serious consideration to Mr. Mock's positive efforts when making its decision regarding the disposition of his case.

Sincerely,

Patricia Coyle

Patricia Coyle
E. S. L. Instructor/Barriers Facilitator

13 November 2006

To Whom It May Concern:
Re: Travis Mock

Travis Mock is currently in the education program at the Santa Ana Jail.
He is enrolled in Sociology 112, Portrait of a Family", through Santa Ana Community College, Santa Ana, California. He has maintained an A average and completed all course work ahead of schedule.
Mr. Mock has taken a great enterest in the course material and makes significant contributions to class discussion.

Michael K. Cooke
Instructor, Santa Ana College, Santa Ana, California
Santa Ana Jail Facility

PROOF OF SERVICE

I, the undersigned, declare that I am a resident or employed in Los Angeles County, California; that my business address is the Office of the Federal Public Defender, 321 East 2nd Street, Los Angeles, California 90012-4202; that I am over the age of eighteen years; that I am not a party to the above-entitled action; that I am employed by the Federal Public Defender for the Central District of California, who is a member of the Bar of the United States District Court for the Central District of California, and at whose direction I served the **DEFENDANT'S POSITION RE: SENTENCING FACTORS; EXHIBITS**

On December 28, 2006, following ordinary business practice, service was:

[X] Placed in a closed envelope, for collection and hand-delivery by our internal staff, addressed as follows:

[] By hand-delivery addressed as follows:

[] Placed in a sealed envelope for collection and mailing via United States Mail, addressed as follows:

[] By facsimile as follows:

ANNE VOIGTS
Assistant U.S. Attorney
U.S. Courthouse
312 No. Spring Street, 13th Fl.
Los Angeles, CA 90012

ALEXIS BERG, USPO
312 N. Spring St. 6th
Los Angeles, CA 90012

This proof of service is executed at Los Angeles, California, on December 28, 2006.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

MIRELA POPESCU